IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

CITY OF WOODINVILLE,

Petitioner,

NEIGHBORS TO SAVE WELLINGTON PARK,

Petitioner,

v.

GROWTH MANAGEMENT HEARINGS BOARD,

Respondent,

SNOHOMISH COUNTY,

Respondent.

Thurston County Superior Court
Nos. 16-2-02541-34 and 16-2-02628-34

(GMHB No. 15-3-0016c)

ORDER DENYING REQUESTS FOR CERTIFICATES OF APPEALABILITY

I. REQUEST FOR CERTIFICATE OF APPEALABILITY

This matter came before the Growth Management Hearings Board (GMHB) pursuant to RCW 34.05.518 on duplicate requests for certificates of appealability of the Board's Final Decision and Order (FDO) in GMHB No. 15-3-0016c. The City of Woodinville (Woodinville) applied for direct review to the court of appeals and requested a certificate of appealability in regards to its appeal filed in Thurston County Superior Court (No. 16-2-02541-34).[1] Neighbors to Save Wellington Park (NSWP) filed an application for direct review and request for a certificate of appealability in regards to its appeal filed separately in Thurston

[1] Woodinville Request for Certificate of Appealability (July 6, 2016).

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County Superior Court (No. 16-2-02628-34), attaching as its argument the application filed by Woodinville.[2] Therefore, the Board considers and rules on the requests together.

II. PROCEDURAL BACKGROUND

Woodinville and NSWP (hereafter, "Petitioners") each challenged whether Snohomish County failed to comply with SEPA and GMA requirements in adopting Motion 15-410, declaring surplus real property (Wellington Hills) and authorizing its sale by intergovernmental transfer to a school district. Petitioners sought review before the Board alleging the county's action was a *de facto* amendment to the county comprehensive plan's park element and county development regulations pertaining to school siting. The Petitions for Review were consolidated into Case No. 15-3-0016c.

The Board conducted a Hearing on the Merits (HOM) on April 27, 2016, and issued a final decision and order on May 26, 2016, dismissing the case for lack of subject matter jurisdiction. Petitioners filed a joint motion for the Board to reconsider its final decision and order, which the Board denied. Subsequently, Woodinville and NSWP each filed separate appeals in Thurston County Superior Court.

III. AUTHORITY AND ANALYSIS

The Administrative Procedure Act, RCW 34.05.518, sets forth the criteria and procedures for Certificates of Appealability. RCW 34.05.518(3) identifies the Growth Management Hearings Board as an "environmental board," and establishes the following criteria under which a certificate of appealability may be issued by an environmental board:

> (b) An environmental board may issue a certificate of appealability if it finds that *delay in obtaining a final and prompt determination of the issues would be detrimental to any party or the public interest* and either:
> (i) Fundamental and urgent statewide or regional issues are raised; or
> (ii) The proceeding is likely to have significant precedential value.

(Emphasis added). The Board reviews requests for certification in light of each of these criteria. Issuance of a certificate is discretionary: a board "may" issue a certificate. RCW

[2] NSWP Request for Certificate of Appealability (July 11, 2016).

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34.05.518(4) requires a board to state in its certificate of appealability "which criteria it applied [and] explain how that criteria was met." As detailed below, the Board is not persuaded that delay in obtaining a final determination will be detrimental to any party or the public.

A. Detrimental Delay

This is a threshold question as the Board may not issue a certificate of appealability unless "delay in obtaining a final and prompt determination of the issues would be detrimental to any party or the public interest."

Subject Matter Jurisdiction. First, the Board dismissed the instant case for lack of subject matter jurisdiction[3] after the Board determined that the challenged action, which was a motion to approve the sale of surplus property, did not on its face adopt or amend a comprehensive plan or development regulation[4] as required for the Board to have jurisdiction.[5] Thus, the Board looked to the appellate guidance provided in *Alexanderson v. Board of Clark County Commissioners*[6] and analyzed whether the action was a *de facto* amendment because it, "in effect, supersede[d] and amend[ed] the comprehensive plan."[7] In order to make that determination, the Board considered the factors set forth in *BD Lawson Partners LP*.[8] The Board evaluated the Petitioners' various arguments to determine if the

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[3] The jurisdiction of the GMHB is statutorily established by RCW 36.70A.280(1), which reads in pertinent part:
> (1) The growth management hearings board shall hear and determine only those petitions alleging either:
> (a) That, except as provided otherwise by this subsection, a state agency, county, or city planning under this chapter is not in compliance with the requirements of [the GMA], …or [SEPA] as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 …

[4] RCW 36.70A.280(1); *Woods v. Kittitas County*, 162 Wn.2d 597, 609, 174 P.3d 25 (2007).

[5] Final Decision and Order (May 26, 2016) at 3-22.

[6] *Alexanderson v. Board of Clark County Commissioners*, 135 Wn. App. 541, 548-50, 144 P.3d 1219 (Div. 2 2006)

[7] *Alexanderson*, *et al. v. City of La Center*, GMHB No. 12-2-0004 (Order on Dispositive Motions, May 4, 2012) at 11.

[8] *BD Lawson Partners LP, et al. v. City of Black Diamond*, GMHB No. 14-3-0007 (Order of Dismissal, August 18, 2014) at 5-6, the Board identified the following test:

- Whether an enforceable agreement or action has the actual effect of requiring the jurisdiction to act inconsistently with its planning,[8] and/or
- Whether a unilateral action makes inevitable a subsequent legislative result enacting a predetermined amendment to the comprehensive plan or development regulations.

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challenged action required the County to (1) act inconsistently with its planning and/or (2) made inevitable a subsequent legislative result enacting a predetermined amendment to the comprehensive plan or development regulations and concluded that the challenged action did not.

Thus, appellate review would be on the question of the Board's jurisdiction. Petitioners have not explained how delay in determining the question of subject matter jurisdiction will be detrimental. Instead, Petitioners assert that delay will be detrimental because the status of the Wellington Hills site will be in doubt and the Northshore School District's (District) $11 million dollar payment will be tied up with no benefit to the District. The Board acknowledges that, in order to make its determination on jurisdiction, the Board reached findings and conclusions on the merits of Petitioners allegations that the action was in conflict with the County's comprehensive plan.[9] Therefore, the Board considers the arguments Petitioners present regarding the effect of delay.

Status of the Wellington Hills site. Petitioners desire that the property known as Wellington Hills be a passive recreation park and not developed as a school site.[10] Snohomish County and the Northshore School District (District) entered into a purchase and sale agreement in October of 2015[11] – nearly two years ago. Petitioners now assert that "the County/UGA agreement explicitly called out the ability to develop schools on the property."[12] However, as noted in the Board's FDO, the challenged Motion reads in relevant part:

> WHEREAS, the County makes no representation nor does the County provide any assurance, warranty or guarantee of future approval of the District's intended use of the Wellington Hills Property; …[13]

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[9] Petitioners did not challenge the GMA compliance of the County's pre-existing comprehensive plan in their Petition for Review. The issue was raised on Request for Reconsideration but was not timely as the challenged action did not bear on whether the County's pre-existing school siting policies complied with Countywide Planning Policies. Joint Motion for Reconsideration (June 6, 2016) at 1, 4; Order Denying Reconsideration (June 13, 2016) at 1-2.

[10] NSWP PFR (December 11, 2015) at 1-3.

[11] Requests for Certificate of Appealability at 2.

[12] *Id.*

[13] Motion No. 15-410 (October 14, 2015) at 1 (Attached as Tab 25 to Woodinville Brief).

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The same language appears on the Executive/Council Approval Form.[14] County development regulations applicable to the property require a conditional use permit for siting schools so that any development will be subject to a site-specific permitting action wherein impacts to Woodinville's infrastructure must be addressed.[15] Further, it was undisputed that the District has not updated its capital facilities plan[16] – a Snohomish County prerequisite for school capacity expansion projects planned to occur within 2-5 years.[17] Thus, development of the property is not imminent and Petitioners will have an opportunity to raise concerns if and when the District applies for a development permit. The Board finds no detriment to Petitioners' interests that would necessitate direct review.

Northshore District Financial Investment. Petitioners assert that Northshore School District's $11 million dollar purchase payment will be tied up "with no benefit to the District" pending the outcome of the appeal.[18] The Board notes that the District did not seek to intervene in the case as an interested party. Beyond a bare assertion, Petitioners have not shown that delay in obtaining a final resolution poses a detriment to the District or the public resulting from the funds being "tied up."

Judicial Economy. Petitioners have announced their intent to pursue this matter until an appellate court decision is obtained and speculate that respondent Snohomish County will do likewise.[19] Although the likelihood of appeal beyond superior court is a factor in APA certification,[20] it is omitted from the plain language of the statute outlining the factors an environmental board may consider.[21] Instead, Petitioners advance a financial argument that "expenditure by the City and the County of substantial resources to obtain a superior court decision that will not be final is not in the public interest."[22] The Board shares Petitioners interest in judicial economy, but notes the City's argument would support direct review in

[14] County Ex. 3.1 at 2 (attached as Tab 24 to Woodinville Brief).
[15] FDO at 10-11; County remarks at the HOM, Transcript at 49-50.
[16] NSWP Brief at 12; Petitioners' remarks at HOM, transcript at 8-12.
[17] SCC30.66C.030; SCC 30.66C.040; SCC 30.66C.045(2).
[18] Requests for Certificate of Appealability at 3-4.
[19] *Id.* at 4.
[20] RCW 34.05.513(2)(c)
[21] RCW 34.05.518(3)(b)
[22] Requests for Certificate of Appealability at 4.

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any instance where a party threatened not to be satisfied with Superior Court outcomes. It would be premature for the Board to assume this case will ultimately require appellate review.

Conclusion: Petitioners' arguments for direct review based on detrimental delay are not persuasive. For the reasons stated above, the Board finds review by the Superior Court will not impose delay detrimental to the interests of the parties or the general public.

B. Required Secondary Criteria

In *addition* to detrimental delay, RCW 34.05.518 (3)(b) requires the Board to find either fundamental and urgent statewide or regional issues *or* a likelihood of significant precedential value. *Notwithstanding the preceding findings and conclusions that the necessary element of detrimental delay to the parties or the public is not met, the Board elects to comment briefly on the remaining issues raised by Petitioners.*

1. Fundamental and Urgent Statewide or Regional Issues Raised

School Siting Issues. Petitioners assert that guidance is needed on whether a local government planning under the GMA "may subvert the GMA [principle that lands outside urban growth areas should not be used for development of schools]" to serve predominantly urban populations.[23] However, as the Board has twice explained in this case, the GMA compliance of Snohomish County's school siting regulations was not challenged by the petitioners. As stated in the FDO:

> The County's school siting policies are not at issue in this case. Had there been a challenge to the County's comprehensive plan update alleging that its school siting policies were not in compliance with the multi-county planning policies (MPPs) of Vision 2040, the Board might have had more to say. See, *Summit-Waller, et al. v. Pierce County*, Final Decision and Order, GMHB Case No. 15-3-0010c and Order Finding Continuing Non-Compliance in coordinated Case No. 12-3-0002c (May 9, 2016) at 38-53.[24]

[23] Requests for Certificate of Appealability at 4-5.
[24] FDO at 12, fn 54.

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The Board attempted to further clarify this point in its recent Order Denying Reconsideration:

> Petitioners alleged that the sale of the Wellington Hills property was inconsistent with the County's existing school siting policies although the GMA compliance of the school siting policies themselves was not at issue. Thus, the instant case did not address, and the Board did not decide, whether Snohomish County's school siting policies comply with GMA. *Woodinville, et al. v. Snohomish County*, GMHB No. 15-3-0016c (Order Denying Reconsideration, June 13, 2016) at 2. Citation omitted.

The Board agrees with Petitioners that complying with GMA requirements for siting schools outside urban growth areas is an issue of regional importance. But, again, Petitioners alleged that the action was inconsistent with pre-existing policies. They did not challenge the GMA compliance of those policies.[25] Further such a challenge would have been untimely because RCW 36.70A.290(2)[26] limits the time within which a jurisdiction is exposed to a potential GMA challenge to within sixty-days after publication of the action.[27] Thus appellate review of the instant case would not decide the issue raised by Petitioners on Reconsideration.

Conclusion: The Board finds this case does not address fundamental or urgent issues of statewide or regional importance.

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[25] As Petitioners point out, the Board recently addressed these issues in its *Summit-Waller* decision. Requests for Certificate of Appealability at 4. In contrast to the instant case, the challenge raised and the facts analyzed in *Summit-Waller* went directly to what is required for school siting policies to comply with GMA and Vision 2040.

[26] RCW 36.70A.290(2) reads in pertinent part:

> All petitions relating to whether or not an adopted comprehensive plan, development regulation, or permanent amendment thereto, is in compliance with the goals and requirements of this chapter or chapter 90.58 or 43.21C RCW must be filed within sixty days after publication …

[27] See, e.g., *Torrance v. King County,* 136 Wn.2d 783, 792, 966 P.2d 891 (1998) (Board did not have jurisdiction to decide issues raised outside the sixty-day limit); *Bothell, et al. v. Snohomish County,* GMHB No. 07-3-0026c (FDO, Sept. 17, 2007) at 18 (Collateral attacks on sufficiency of previously adopted plan components untimely, Board may only consider only whether challenged actions are consistent with them); *McVittie IV,* GMHB No. 00-3-0006c (Order on Dispositive Motion, April 25, 2000) at 4-5 (where County did not revise its minimum standards (LOS), inventories, or needs assessment in the challenged enactments, the challenge is untimely).

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2. Significant Precedential Value

Petitioners contend that this matter is likely to have significant precedential value regarding what actions constitute *de facto* comprehensive plan amendments.[28] The Board acknowledges that appellate rulings on GMA questions provide precedential guidance, not only to the parties, but to other local governments and to the Board. However, appellate guidance exists as to what constitutes a *c*omprehensive plan amendment[29] and the Board has numerous subsequent decisions on the subject.[30] Likewise, the Board has long held that it does not have jurisdiction over surplus property issues.[31] Certainly the outcome sought by Petitioners – an appellate ruling that the Board has jurisdiction over whether and to whom a jurisdiction may sell surplus property - would have precedential effect and significantly expand the Board's current understanding of its jurisdiction, but Petitioners advanced no argument to satisfy the statutory requirement that the Board find that delay would be detrimental.

Conclusion: The Board finds an appellate decision may have precedential value, but finds no likelihood of detriment due to delay that supports expedited review.

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[28] Requests for Certificate of Appealability at 5.

[29] See *Alexanderson v. Board of Clark County Commissioners*, 135 Wn. App. 541, 549-50, 144 P.3d 1219 (Div. 2, 2006).

[30] See, e.g. *Olympia Master Builders, et al. v. Thurston County,* GMHB No. 15-2-0002 (FDO ,May 12, 2016) at 9; *BD Lawson Partners LP, et al. v. City of Black Diamond*, GMHB No. 14-3-0007 (Order of Dismissal, August 18, 2014) at 5-6 (factors to be considered in determining if action amended comprehensive plan *de facto)*; *Your Snoqualmie Valley v. City of Snoqualmie*, Order on Motions, GMHB Case No. 11-3-0012 (March 8, 2012) at 12-13 (pre-annexation agreement in direct contradiction of city comprehensive plan policies was a *de facto* amendment); *Alexanderson*, *et al. v. City of La Center*, GMHB No. 12-2-0004 (Order on Dispositive Motions , May 4, 2012) at 11.

[31] *See, e.g., Petree and Westergreen, et al. v. Whatcom County*, GMHB No. 13-2-0018c (Order of Dismissal, July 17, 2013) at 10 (change of ownership not a change in land use, thus no de facto amendment when challenge action consistent with comp plan); *Six Kilns v. City of Sumner,* GMHB No. 13-3-0005 (Order of Dismissal on Motions, July 16, 2013) at 8-9 (Resolution authorizing sale of golf course was not a final action subject to Board's jurisdiction); *Association to Protect Anderson Creek v. City of Bremerton,* GMHB No. 95-3-0053 (Order on Bremerton's Dispositive Motions, October 18, 1995), at 9 (Board does not have jurisdiction over provisions for sale of surplus property).

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IV. ORDER

Having reviewed the applications for certificates of appealability, the relevant provisions of the Administrative Procedures Act, in particular RCW 34.05.518(3)(b), and the facts of this matter, the Board finds no basis upon which to grant Petitioners' requests. The Board **DENIES** Petitioners' requests for a certificate of appealability for direct review in Thurston County Superior Court Case No.16-2-02541-34 and No. 16-2-02628-34.

Entered this 26th day of July, 2016.

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Cheryl Pflug, Board Member

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Nina Carter, Board Member

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